In the

United States Circuit Court of Appeals

For the Ninth District

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a Corporation,

Appellant,

VS.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees,

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S BRIEF

DAVIS & GROFF,
(*William Hatch Davis*)
(*Guy B. Groff*)
Attorneys for Appellant.

Office and Post Office Address
1333 Dexter Horton Building
Seattle, Washington

FILED
JUL 8 - 1938
PAUL P. O'BRIEN,
CLERK

SHEPARD PRINT, KE. 4934

INDEX OF SUBJECT MATTER

INDEX OF AUTHORITIES

Acts of Congress

Washington Statutes

In the

United States Circuit Court of Appeals

For the Ninth District

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a Corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees,

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The action was commenced in the Superior Court of the State of Washington for Kitsap County by William E. Bilquist, John Myhre and Signe Myhre, against the appellant Fidelity and Guaranty Fire Corporation of Baltimore, and F. E. Langer, by the filing with the clerk of a summons and complaint, and

by service on the Insurance Commissioner of the State of Washington, for the appellant.

The action was one of which the United States District Court would have original jurisdiction under 28 U. S. C. A., Sec. 41.

The petition for removal showed that the plaintiffs and the defendant Langer were citizens of the State of Washington, and that the defendant Fidelity and Guaranty Fire Corporation was a citizen of the State of Maryland; that the suit was one of a civil nature at common law of which the United States District Court would have original jurisdiction; that the matter in dispute exceeded three thousand dollars, exclusive of interest and costs; and that there was set forth in the complaint a separable controversy between the plaintiffs and the defendant Fidelity and Guaranty Fire Corporation from that set forth as to the defendant Langer, and that such controversy could be fully determined without affecting the interest of the defendant Langer, or the right of the plaintiffs to recover against him.

The plaintiffs sought recovery against the defendant, the appellant herein, upon a written policy of fire insurance. The claim for recovery against Langer sounded either in negligence or fraud. Langer was not liable upon the policy. A joint liability was not

charged, nor did it exist, and the cause was removable as to the appellant.

The removal is sustained by 28 U. S. C. A. sections 71 and 72, Judicial Code Sec. 28.

No motion was made to remand.

The petition for removal (Tr. 12), the notice of the filing of the petition and bond for removal (Tr. 11), the bond (Tr. 17), and the order of removal (Tr. 20), are in proper form and comply with the acts of Congress.

This appeal is from the final judgment of the United States District Court, and is sustained by 28 U. S. C. A. 225 A; Judicial Code, Sec. 128 (Tr. 67).

SPECIFICATION OF ERRORS RELIED UPON

Appellant will rely upon its assignments of error, numbered first, second, third, fourth and tenth.

Several of the errors relied upon involve more than one assignment. Appellant invoked the favorable action of the trial court by different motions, and the denial thereof was made the subject of separate exceptions and assignments.

Appellant's motions for a directed verdict and for judgment notwithstanding the verdict should have been granted because;

A.

It appeared by the uncontradicted evidence that the loss for which the plaintiffs sought recovery was not one within the coverage of the policy.

The error is covered by the first and second assignments. (Tr. 152, 153). For motions for directed verdict, and exceptions, see Tr. 142-3. For motion for judgment notwithstanding the verdict, and exceptions, see Tr. 143-4.

B.

It appeared by the uncontradicted evidence that the hazzard had been increased within the meaning and intent of the provision of the policy making the entire policy void if the hazzard be increased by any means within the knowledge or control of the insured, by the use of the insured premises as a place for the sale of beer and wine and for public dancing.

The error is covered by the third and fourth assignments (Tr. 154-5). For motions for directed verdict and exceptions (see Tr. 142-4). For motion for judgment notwithstanding the verdict and exceptions (see Tr. 143-4-5).

In its judgment the trial court eroneously added to the amount found due by the verdict, interest covering a period of one year antedating the return of the verdict.

The error is covered by the tenth assignment (Tr. 159). For judgment, and exceptions (see Tr. 67-8-9).

STATEMENT OF CASE

This litigation arises out of a policy of fire insurance issued on August 10th, 1935, by appellant, insuring appellee, William E. Bilquist, for the term of three years, as owner, against all direct loss or damage by fire to the amount of $2,500.00 on the two story, shingle roof, frame building situated on lots 1 and 2 of block 4 and lots 8 and 9 of block 5 of Davis Addition to Manchester, Washington, while occupied only for dwelling house purposes, and to the amount of $1,500.00 upon household furnishings and personal effects owned by the insured, or members of his family, all only while contained in the above dwelling house building.

The policy was subject to the following stipulations and conditions incorporated therein.

> No officer, agent or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any

privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached (Tr. 77).

2. This entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the hazzard be increased by any means within the control or knowledge of the insured (Tr. 80).

No waiver of any condition or stipulation of the policy was ever endorsed thereon or added thereto, and no application was ever made therefor.

At the time the policy was issued F. E. Langer was president, managing officer and principal stockholder of the Kitsap County Bank, located at Port Orchard, county seat of Kitsap county in which Manchester is situated, and was also the local agent for the appellant at Port Orchard.

The insured property was then owned by William E. Bilquist and John Myhre and wife, as tenants in common, and was subject to a first mortgage to the Kitsap County Bank executed by them, and to a second mortgage to Clarence Jones. That Myhre had put money into the property and had an interest in it, was known to Langer but not to the appellant. Langer told Myhre that he would like to write the insurance and Myhre said he could. They agreed for $2500.00 on the building and $1500.00 on the personal property. No written application was made. Langer filled out

Standard Bureau Form 548 (Tr. 73-115), and sent it to appellant's general agents at Seattle to have the rate fixed and the policy written. It was there written in accordance with the information received from Langer and sent to Langer to be signed and delivered by him. The form referred to became a part of the policy, and by direction of Langer, the loss, if any, was made payable, first to the Kitsap County State Bank, first mortgagee, and second, to Clarence Jones, second mortgagee. Langer signed the policy and turned it over to the first mortgagee for keeping.

The insured building had been used as a summer hotel. That it was the intention of the owners to so use it was known to Langer, but unknown to the appellant. He received no instructions from Myhre or Bilquist as to how the insurance should be written.

The policy was issued in consideration of a premium of $77.00, charged to and paid out of the account of John Myhre in the Kitsap County Bank. Had the policy been written for occupancy as an inn or hotel, under the regulations of the Washington Surveying and Rating Bureau, a bureau under the control and supervision of the Insurance Department of the State of Washington, it would have been insurable only for one year, and the applicable rate for one year would have been $138.40.

The furnishings and effects contained in the insured building were the furnishings and equipment of a hotel or inn, or of a beer parlor, and were not household furnishings, nor the personal effects of the insured, or of any member of his family.

Subsequently, the policy, as Langer testified, was given to Myhre for examination, or, as Myhre testified, merely shown to him, and Myhre discovered that his name was not included as an insured and told Langer that he was a half owner and that if he was going to pay for the policy he wanted his name on it. Langer accordingly attached to the policy a rider making the loss, if any, payable firstly and secondly as originally provided, and thirdly, to John and Signe Myhre, third mortgagees. Except upon this occasion no one requested the privilege of examining the policy. Myhre made no inquiry as to whether, or how, his objection had been met, and until after the fire did not know that he appeared in the policy as a third mortgagee. No other objection to the policy as written was ever made.

At the time the policy was issued the insured building was being occupied as a summer hotel or inn, where meals and lodgings were sold to the public. From December 1935 to April 1936, it was closed. In April 1936, Ervin Moen, acting under a profit sharing ar-

rangement with appellees, obtained from the Washington State Liquor Control Board a license to sell beer and wine in the building and installed a bar and counter with stools in a room at the northwest corner. From that time, and until its destruction by fire, the building was occupied by the appellees in part as an inn or hotel and in part as a place for the public sale of beer and wine and as a place for public dancing. Appellees employed a man who played the piano for the dancing which was permitted until closing time about 1 o'clock A. M.

No additional wiring or heating apparatus was put in when the beer parlor was installed. There were complaints against places selling beer in Manchester and after a hearing the Washington State Liquor Control Board refused to renew any licenses.

Occupancy for the public sale of beer and wine was not authorized by the policy and increased the hazzard over the hazzard incident to occupancy for dwelling house purposes only, and over that incident to its occupation for the purpose of selling meals and lodgings, and was not known to Langer or to the appellant until after the property was destroyed by fire.

On September 12th, 1936, the property was totally destroyed by fire. Its cause was unknown.

A proof of loss was filed with appellant on December 3rd, 1936. Appellant rejected it, in part, because the building was not occupied only for dwelling house purposes, and because the hazzard had been increased by means within the knowledge and control of the insured. It denied liability under the policy and tendered to the appellees the amount of the premium paid with interest thereon at 6% per annum from the date of payment to the date of tender; which tender was refused.

In their complaint the appellees alleged that Langer for the protection of his own bank and upon his own motion and instance caused to be written and delivered to his own bank the policy of insurance sued upon. Upon removal to the District Court, the appellant answered, admitting the issuance of the policy; that Langer caused it to be written at his own instance for the protection of his bank; the loss of the building and contents by fire; the filing of proof of loss and its rejection; but otherwise denying the allegations of the complaint and incorporating the following affirmative defenses.

> That the appellant under the policy undertook and agreed to insure the described building while said building was used and occupied only for dwelling house purposes, and not otherwise, and undertook and agreed to insure the described household furnishings and personal effects only while contained

in the described dwelling house building and while the same was used only for dwelling house purposes, and not otherwise; and that said insured building was not used and occupied only for dwelling house purposes, but on the contrary at the time of its destruction by fire was used and occupied for business purposes and as a hotel or inn and as a place for the public vending and sale of beer and wine, and for public dancing (Tr. 33, 39, 40, 41).

2. That from and after the 6th day of April, 1936, and until its destruction by fire, the insured building was in part used for the sale and vending to the public of beer and wine under license from the Washington State Liquor Control Board, and as a public dance hall where public dancing was permitted for compensation. That such a use was within the knowledge and control of the insured and increased the hazzard of the insurance, and under the terms and stipulations of the policy rendered the entire policy void; and that no agreement otherwise providing was ever endorsed upon the policy or added thereto (Tr. 41, 42, 43).

In its answer the appellant tendered the amount of premium paid, with interest thereon.

The appellees filed a reply and an amended reply admitting the terms, conditions and stipulations of the policy, the extent of the undertaking of the appellant thereunder (Tr. 55), that the insured building when the policy was issued was not being used only for dwelling house purposes but was used as an inn or hotel where meals and lodgings were sold to the public (Tr. 55); the procuring of a license for the sale of

beer and wine and the use of the insured premises with the knowledge and under the control of the insured as a hotel or inn and as a place for the public sale of beer and wine and for public dancing, continuing to the time of the fire; that no agreement permitting such use was ever endorsed upon the policy or added thereto; the tender of the premium with interest; and otherwise generally denying the allegations of the affirmative defenses except as admitted or qualified by the allegations of the complaint, and alleging that the use of the property at the time of the writing of the policy and its subsequent use as a place for selling beer and wine and for public dancing was known to the appellant's agent and did not increase the hazzard (Tr. 55).

Upon the trial before a jury the appellant objected to the introduction of oral testimony of conversations between Langer, Bilquist and Myhre relied upon to establish a waiver of the conditions and stipulations of the policy, in violation of provisions as to the manner in which its conditions and stipulations alone might be waived. The objection being overruled such testimony was received by agreement subject to appellant's motion to strike (Tr. 96). A motion to strike was denied (Tr. 127).

At the close of all the evidence the appellant chal-

lenged the legal sufficiency of the evidence to sustain a verdict for the plaintiffs and moved that the court withdraw the case from the consideration of the jury and direct a verdict for the defendant. The motion was denied.

In submitting the cause to the jury the court reserved for its later and subsequent consideration the determination of all questions of law arising upon the appellant's motion for a directed verdict.

On February 1, 1938, the jury returned a verdict in favor of the appellees in the sum of $4,000.00.

Thereupon the appellant filed its motion for a judgment in its favor notwithstanding the verdict, which motion, being heard and considered, was denied. A memorandum opinion thereon was filed by the court (Tr. 145).

Judgment was entered on February 28th, 1938, for the appellees to recover from the appellant the amount of the recovery allowed by the verdict, plus interest thereon from February 1, 1937. The appellant appealed.

ARGUMENT.

Proceedure.

A.

The appellant's first and third assignments of error are based upon the denial of its motions for a directed verdict.

At the close of all the evidence the appellant challenged the legal sufficiency of the evidence to sustain a verdict for the plaintiffs, and moved that the court instruct the jury to return a verdict for the defendant (Tr. 142).

The question of whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action, is a question of law which arises in the progress of the trial. When the trial is before a jury the question is reviewable on exception to a ruling upon a request for a preemptory instruction for a verdict.

Dunsmuir v. Scott, 217 F. 200.

The motion for a directed verdict is sufficiently definite if it challenges the legal sufficiency of the evidence to sustain a verdict for the plaintiffs.

In *Balakla Cons. C. Co. v. Reardon*, 220 Fed. 584 a motion for a preemptory instruction that the jury under the law and the evidence must return a verdict for the defendant was, by this court, held sufficient (589).

It is in substance a motion for a directed verdict. There is no substantial difference between it and a directed verdict. Both present a challenge to further proceedings upon the ground that the evidence under

the law will not sustain a verdict in favor of the adverse party, and that there is no issue for examination by the jury.

Where the contention is the broad one that the proof as a whole fails to disclose liability, a general motion is sufficient to challenge the attention of court and counsel to the legal point involved.

Jefferson Standard Life Ins. Co. v. Stevenson 70 F. (2d) 72.

New York Life Insurance Co. v. Doerksen, 75 F. (2d) 96.

Standard Oil Co. of Ky. v. Noakes, 59 F. (2d) 897-899.

B.

Appellant's second and fourth assignments of error are based upon the denial of its motion for a judgment notwithstanding the verdict.

The testing of the legal sufficiency of the evidence to sustain a verdict by motion for judgment notwithstanding the verdict, is one of the rules of practice and modes and forms of procedure obtaining in the state of Washington, to which conformity is required in the Federal courts by the "Conformity Act."

U. S. C. A. Title 8, Sec. 724.

For motion for judgment notwithstanding verdict (see Tr. 59).

> "Whether a defendant in an action at law may present in one form or another, or by demurrer to the evidence, the defense that the plaintiff upon his own case shows no cause of action, is a question of practice, pleadings, forms and modes of proceedure, as to which the courts of the United States are now required by the Act of Congress, June 1, 1872, C 255, 17 Stat. 197, reenacted in Sec. 914 of Revised Statutes, to conform as near as may be to those existing in the courts of the state in which the trial is had."
>
> Mr. Justice Hughes, dissenting opinion, in *Slocum v. New York Life Ins. Co.* 228 U. S. 364 P. 421.

The motion for judgment notwithstanding the verdict has the authority of statutory enactment in the state of Washington.

Rem. Rev. Stat. of Wash., Sec. 387.

In *Roe v. Standard Furniture Co.* 41 Wash. 546, 83 P. 1109, it was held that it was competent for the trial court after a verdict for the plaintiff to entertain a motion by the defendant for a judgment notwithstanding the verdict and to enter a judgment for the defendant. Historically the motion was one that could only be made by the plaintiff, but the practice has been changed in this state and it is now proper to enter a final judgment on a motion non obstante vedicto in favor of either party where the undisputed evidence warrants it (p. 548-550).

Hanson v. Washington Water Power Co., 165 Wash. 497; 5 P. (2d) 1025.

Haydon v. Bay City Fuel Co., 167 Wash. 212; 9 P. (2d) 98.

Dailey v. Pheonix Investment Co., 155 Wash. 597; 285 P. 657.

Upon motion for judgment notwithstanding the verdict in these cases final judgment was entered for the defendant.

The only case throwing any doubt upon the right of a Federal District Court to entertain such a motion, and of the Circuit Court of Appeals to review its ruling thereon, and to enter the appropriate judgment is the case of *Slocum v. New York Life Ins. Co.* 228 U. S. 364, where the court divided five to four, and the four joined in an able dissenting opinion written by the present chief justice.

The majority opinion proceeds upon the theory that where a jury in a Federal court has rendered a verdict the matter can not be reexamined upon motion for judgment *non obstante verdicto* and final judgment entered without violation of the seventh amendment to the Federal constitution. It has been distinguished, but never followed.

Baltimore and Carolina Line v. Redman, 295 U. S. 654; 79 Law Ed. 1636 was an action to recover for

personal injuries caused by defendant's negligence. At the conclusion of the evidence in the District Court the defendant moved for a directed verdict upon the ground of insufficiency of the evidence to sustain a verdict for the plaintiff. The court submitted the case to the jury reserving for consideration the questions of law involved in the motion for a directed verdict. A verdict was returned for the plaintiff. Thereafter the court considered the motion for a directed verdict and the evidence and considering it sufficient to sustain the verdict entered judgment for the plaintiff. Upon appeal the Circuit Court of Appeals held the evidence insufficient and reversed the judgment, holding that under the rule in *Slocum v. New York Life Ins. Co.* 228 U. S. 364, it could not enter final judgment but must remand for a new trial. Upon *certiorari*, the Supreme Court granted a judgment of dismissal upon the merits. In the opinion it is said:

> "At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments." p. 659.

It is apparent that when a cause is submitted to a jury with a reservation by the court of all legal questions involved in a motion for a directed verdict, the re-examination of fact, if any, involved in the subsequent consideration of such questions, in the rulings thereon, and in the review by the appellate court, is in accordance with the rules of the common law. This is all that is required by the seventh amendment to the Federal constitution.

The trial court purposely reserved for its later consideration all questions of law arising upon the motion for a directed verdict in order that the case might be finally disposed of upon appeal (Tr. 143).

It is obvious that the court now considers that *Slocum v. New York Life Ins. Co.* 228 U. S. 364 should not apply where the facts are not identical. The majority opinion recognized the duty of the trial court to have granted the motion for a directed verdict and to have entered judgment accordingly, but proceeds to its conclusion that having submitted the case to the jury the seventh amendment stood in the way of any court thereafter entering the judgment that the trial court should have entered.

If the constitutional objection was a valid one it could not be overcome by rule of practice.

Yet the Supreme Court of the United States, by its

Federal Rules of Civil Proceedure, effective September 1, 1938, governing the procedure in the District Courts of the United States, Rule 50 sub. div. b, has provided.

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with his motion for a directed verdict; or, if a verdict was not returned, such party within ten days after the jury has been discharged may move for a judgment in accordance with his motion for a directed verdict. * * * If a verdict was returned, the court may allow the judgment to stand, or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed, or may order a new trial."
>
> U. S. Supreme Court, Law Ed. Advance Opinions Vol. 82, No. 8, page 22 of Rules of Civil Procedure.

It is not contended that these rules are applicable to this case, but that the application of the decision in *Slocum v. New York Life Ins. Co.* to a case where the legal questions arising upon a motion for a directed

verdict are reserved for later consideration in submitting a case to a jury, is not in accordance with the present views of the Supreme Court.

That court has either swung to the views of the four dissenting justices that a motion for a directed verdict submits the question of whether there is any fact for the examination of a jury, and that the re-examination of the question of whether there was any issue of fact for the jury is not a reexamination of any fact tried by a jury, or else it is of the opinion that where the questions of law are reserved, a reexamination of such questions is in accordance with the rules of the common law.

The matter bears only upon the judgment to be entered in case error be found.

Slocum v. New York Life Ins. Co. 228 U. S. 364.

ARGUMENT ON ASSIGNMENTS OF ERROR.

I.

The appellees were not entitled to recover. The loss was not one within the coverage of the policy.

The question arises under both the first and second assignments of error; the first arising from the denial of the motion for a directed verdict, and the second from the denial of the motion for a judgment notwithstanding the verdict.

The first assignment is as follows:

> In denying the defendant's motion made at the close of the plaintiff's evidence and renewed at the close of all the evidence, that the court instruct the jury to return a verdict for the defendant because it appears by the uncontradicted evidence that the insured building at the time of its destruction by fire was, and for a considerable time theretofore had been used and occupied as an inn or hotel and as a beer parlor and place for the public vending and sale of beer and wine and for public dancing, and not for dwelling house purposes only, and that the furniture and equipment destroyed by the fire was not household furniture nor personal effects and were not at the time of their destruction contained in a dwelling house building, and that the loss for which the plaintiffs seek recovery was not one within the undertaking of the defendant under its said policy of insurance, for recovery under which the plaintiffs sue, which undertaking was limited to a loss while the insured building was occupied only for dwelling house purposes, and to household furniture and personal effects while contained in such dwelling house building.
>
> Tr. 152.

The second assignment is as follows:

> In denying the defendant's motion that the court enter a judgment for the defendant notwithstanding the verdict of the jury, because it appears by the uncontradicted evidence that the insured building at the time of its destruction by fire was, and for a considerable time theretofore had been, used and occupied as an inn or hotel and as a beer parlor and as a place for the public vending and sale of beer and wine and for public dancing, and not for dwelling house purposes only, and that the furniture and equipment destroyed by fire was not household furniture nor personal effects and

were not at the time of their destruction by fire contained in a dwelling house building, and that the loss for which plaintiffs seek recovery was not within the undertaking of the defendant under its policy of insurance for recovery under which the plaintiffs sue, which undertaking was limited to a loss while the insured building was occupied only for dwelling house purposes and to household furniture and personal effects while contained in such dwelling house building.
Tr. 153.

That the loss sustained while the building was occupied as an inn or hotel and as a place for the vending and sale of beer and wine, and as a place of public dancing was not within the coverage of the policy, is undisputable. The appellees sought to extend the coverage by the application of the doctrine of estoppel.

A.

The law of the State of Washington upon the question of whether the coverage of a policy of insurance, or the restrictions thereon, can be altered, waived or modified by the application of the doctrine of estoppel, is controlling upon the Federal courts.

The contract arising in the state of Washington, its laws establish the rule of decision. The decisions of its highest court are to determine whether the coverage, or the restrictions thereon, may be modified without reformation in equity so as to permit a recovery contrary to the terms of the insurer's undertaking as expressed in the policy.

It seems now to have been clearly determined that the law of the state is to be applied by the Federal Courts in all matters of substantive law, not directly governed by the Constitution of the United States or by the Acts of Congress.

Erie Railroad Co. v. Tompkins, U. S. Sup. Court Adv. Op. Law Ed. Vol. 82 p. 787, decided April 25th, 1938.

B.

The law of Washington draws a distinction between those things in a policy of insurance which constitute representations, conditions or warranties, the breach of which forfeits the contract, and those things which constitute the essential undertaking of the insurer.

In *Reynolds v. Pacific Marine Ins. Co.*, 98 Wash. 362; 167 P. 745 it was held that a clause inserted in a fire insurance policy on a boat warranting that it would be employed in the waters of Puget Sound, British Columbia and Southwestern Alaska not north of Wrangel Narrows, and not to use the west coast of Vancouver Island, was an essential part of the contract and not a warranty. The boat was destroyed by fire while in waters beyond the prescribed limits. A judgment for the insured was reversed because the provisions referred to were a part of the essential undertaking of the contract as much as any other promise to insure.

In *Johnson v. Franklin Ins. Co.*, 90 Wash. 631; 156 P. 567 a stipulation in a policy that the goods were insured "while contained in the frame building while occupied only as a dwelling at No. 30 Franklin St. King County, Washington, was held of the essence of the contract, and the court could not hold that the policy covered the goods elsewhere without making a new contract for the parties. Judgment for the insured was reversed and remanded with direction to enter judgment for the insurer.

The distinction between the application of the doctrine of estoppel to cases where the policy is sought to be forfeited or avoided for breach of some condition or warranty, and to cases where the insured seek to extend the coverage of the policy, and thus bring into existance a liability contrary to the express provisions of the contract, is clearly pointed out by the decisions of the Supreme Court of Washington.

The latest case is that of *Carew, Shaw and Bernasconi v. General Casulty Co.*, 189 Wash. 329; 65 P. (2d) 689 which involved an appeal from a judgment in favor of the insurer notwithstanding a verdict for the insured, in an action to recover on a burglary policy covering a chest inside a safe. The plaintiff was a corporation conducting a department store. An agent of the insurer attempted to interest its officers in fire

insurance, but was informed that the company desired nothing other than burglary safe insurance. A representative of the insurer examined plaintiff's safe to determine the proper premium. Investigation disclosed that a chest inside the safe was burglar proof and would carry a rate of $5.00 per thousand, while the safe itself, being fireproof only, would take a rate of $16.50 per thousand. The appellant decided to obtain the insurance from the respondent, and a binder was ordered to give protection pending the delivery of the policy. The binder covered the entire safe and was sent to the appellant's vice president who examined it, and, finding it in accordance with his oral directions, filed it away. Shortly afterwards a policy covering only the chest was delivered, and appellant's vice president assuming that it followed the terms of the binder, filed it away without reading it. The safe was later burglarized and a large amount of money taken; the chest was not entered.

The court said:

> "Patently, in the absence of events and conditions which, under the terms of the policy, must occur and exist in order to obligate the insurance company to pay the loss, the appellant could not recover under the policy as written." (P. 335).

In speaking of cases involving estoppel, the court said that in those cases the insured was entitled to re-

cover under the policy as written. In those cases the insurer had defended upon the ground that the policy was void for breach of a condition or warranty.

> "This is a case in which the insured seeks to extend the coverage of the policy. This can be done only by reformation. p. 336, *supra.*

Here the appellant is defending upon the ground that assuming the policy to be in full force and effect, the loss claimed is not within its undertaking.

Where the insured can not recover under the policy as written his only remedy under the law of Washington is a reformation of the contract.

This is made exceedingly clear in the opinion cited, where Millard, J. says:

> "One may not by invoking the doctrine of estoppel or waiver, bring into existence a contract not made by the parties and create a liability contrary to the express provisions of the contract the parties did make. The general rule is that while an insurer may be estopped by its knowledge or by statute from insisting upon a forfeiture of a policy, yet under no conditions can the coverage, or the restrictions on the coverage, be extended by the doctrine of waiver or estoppel."
>
> *Carew, Shaw & Bernasconi v. General Casualty Co.*, 189 Wash. 329-336 P. (2d) 689.

To the same effect is the case of *Charada Inv. Co. v. Trinity Universal Ins. Co.*, 188 Wash. 325; 62 P. (2d) 722, which involved a burglary insurance policy upon

a safe and contents. The safe contained 16 compartments, some of which were used by the insured's tenants. It appeared that an agent of the insurer visited insured's place of business and was informed that a policy was desired which would protect valuables in the safe and particularly during business hours when the safe door would remain open, and that the agent agreed to furnish such a policy. Thereafter the agent delivered to the insured a policy which the insured believed and the agent assured him gave the protection promised. The coverage of the policy insured against loss by felonious entry into the safe by force and violence while the safe was duly closed and locked.

The safe was entered while the door was unlocked. A locked inner compartment was entered by force and money taken. The plaintiff brought suit, asking that the policy be reformed so as to cover a loss whether the outer door of the safe was locked or not.

Upon the opening statement of the insured's attorney, the trial court entered an order of dismissal upon the belief that the attorney had waived the claim for reformation of the contract.

Upon appeal, the Supreme Court said that the plaintiff could not recover upon the policy as written, but that the trial court was in error in concluding that counsel in his opening statement had abandoned his

claim for reformation, and that the dismissal was premature.

If the appellees are to recover, they must recover according to the contract. Having sued on it, they must stand on it, and before they may recover they must bring the loss within the coverage of the policy.

Even though all possible estoppels be asserted against the appellant, preventing it from availing itself of any of the provisions of the policy to enforce a forfeiture, they still may not recover under it.

It is the law of Washington that the insurer is entitled to stand on its contract as written, and the insured must bring himself within the terms of the policy before he can establish the insurer's liability thereon.

Isaacson Iron Works v. Ocean Accident and Guaranty Corp., 191 Wash. 221-224; 70 P. (2d) 1026.

Notwithstanding the admission over objection of parole testimony tending to show knowledge by the defendant's agent of the purpose for which the insured building had been used and the purpose for which it was then intended to use it, that he himself wrote the application, that no instructions were given him as to what to put in it—apparently admitted either for the purpose of varying the terms of the written policy, or of establishing an estoppel, parole testimony is in-

sufficient to avail the appellees, because:

1. The coverage, or the restrictions thereon, of a policy of insurance, can not, under the laws of Washington, be changed by application of the doctrine of estoppel.

Carew, Shaw & Bernasconi v. General Casualty Co., 189 Wash. 329; 65 P. (2d) 689.

2. Although the evidence was received (over objection) it is, even after its reception, ineffective to waive or alter the terms of the written policy.

In the State of Washington, the rule that parole evidence may not be received to vary the terms of a written contract is a rule of substantive law and not merely a rule of evidence. If received it is no more effective than if excluded.

> "While the rule known as the parole evidence rule is usually referred to as a rule of evidence, it is more properly a rule of substantive law, since it is a rule of substantive law and not any rule relating to the admissibility of evidence that gives the rule effect."
>
> *Andersonian Inv. Co. v. Wade*, 108 Wash. 373-380; 184 P. 327.

There was objection (Tr. 96), and motion to strike (Tr. 127).

The rule which prohibits the modification of a written contract by parole is one of substantive law, and

not one of evidence. There is no waiver of the right of a party thereto to adhere to the contract as written and have the case determined thereby, merely because parole evidence of what transpired outside the writings has been permitted to come in.

Pitcairn v. Phillip Hiss Co., 125 F. 110.

It is the law and not a rule of evidence that conclusively presumes the finality of written agreements.

Andersonian Inv. Co. v. Wade 108 Wash. 373-380; 184 P. 327.

The coverage of the policy was against direct loss by fire while located and contained as described in the policy, and not elsewhere, to-wit:

> $2,500.00 on two story shingle roof frame building and additions in contact therewith, while occupied only for dwelling house purposes (Tr. 73).
>
> $1,500.00 on household furnishings and personal effects * * * owned by the insured or members of his family, all only while contained in the above dwelling house building (Tr. 74).

Appellees brought suit on the policy as written, making no allegation of waiver or modification, except that the true situation and use of the property was known to Langer and to the appellant (Tr. 34).

Two of the principal uses of the property at the time of the fire were not such uses as are incident to

the occupation of a building only for dwelling house purposes.

1. The occupation and use as a hotel or inn.
2. The occupation and use as a beer parlor and place for the public sale of beer and wine and for public dancing.

In its first affirmative defense the appellant alleged that the insured building until its destruction by fire was occupied for business purposes, and particularly as a hotel or inn where meals and lodging were sold to the public for compenstion. Par. V. First Affirm. Def. Tr. 29.

Neither the reply nor the amended reply denied such allegation; but expressly admitted the use as an inn. Par. IV of Reply to First Affirm. Def. Tr. 46; Par. IV of Amended Reply to First Affirm. Def. Tr. 51.

The appellees bought the property intending to use it as an inn, and immediately began fitting it up as an inn (Tr. 71). When the deal was completed Bilquist immediately took possession and started business (Tr. 100). Their main business was serving meals, beds and over week-end guests (Tr. 103). They served banquets, at one time serving 85 persons, and at another, 75 (Tr. 103). In April, 1936, Ervin Moen obtained a license to operate a beer saloon on the premises (Tr. 109),

which he conducted under an arrangement with Bilquist for a division of profits (Tr. 108), up to the time of the fire (Tr. 101). A room formerly used as a sitting room became a bar room (Tr. 103), and the dining room was used for dancing (Tr. 107), and for serving beer and wine (Tr. 109). A piano player was employed and dancing had every night (Tr. 101), the place remaining open until one o'clock at night (Tr. 105). At times they had big crowds and let them have a good time (Tr. 105). The guests could amuse themselves by dancing, drinking beer and staying up until one o'clock in the morning. As many could come as the place could conveniently hold. They usually had what they considered a choice crowd (Tr. 106). Langer made no endorsement on the policy waiving any of its provisions (Tr. 121). He was not at the place after it became a beer parlor and had no knowledge of how they conducted their business. He never orally, or otherwise permitted the opening of a beer parlor (Tr. 123). He was not informed that a beer parlor was being put in. Bilquist told Myhre of the beer parlor but did not tell Langer (Tr. 109).

There is no evidence that Langer had knowledge of the use of the property for the sale of beer or wine, or for public dancing.

In its third affirmative defense the appellant alleged

the granting of a license for the sale of beer and wine in the building described in the policy, and the use and occupation of portions of such building, until its destruction by fire, as a place for the vending and sale of beer and wine to the public and for public dancing. Par. II III Third Affirm. Def. Tr. 39-40.

These allegations were admitted, but it was affirmatively alleged that these things were known to the appellant or to its agent, Langer. Par. II & III of Reply to Third Affirm Def. Tr. 49. Par. II & III of Amended Reply to Third Affirm. Def. Tr. 55.

The burden was on the appellees to both allege and prove that their loss was within the coverage of the policy. They did neither, but sought a recovery contrary thereto.

C.

The use of the building as a hotel or inn was not an occupation for dwelling house purposes only, and a loss occurring during such use is not within the coverage of the policy.

The question under the law of Washington is whether the use is one ordinarily incident to occupation as a home. If not, and it be one of the principal uses of the property, then a loss arising during such occupation is not within the coverage of a policy insuring while occupied only for dwelling house purposes.

That is the substance of the holding in *Ragley v. Northwestern Nat. Ins. Co.* 151 Wash. 545; 276 P. 537. It was there held that an instruction to the jury that if they found that the insured building was being generally used as a place for the manufacture of intoxicating liquor, or that one of its principal uses was the manufacture of intoxicating liquor, their verdict should be for the insurer, was proper. The court pointed out that the evidence was not sufficient to show that manufacture of liquor was one of the principal uses of the house, and that in view of the great number of uses ordinarily incident to the occupation of a house as a home, the court could not say as a matter of law that the trial court erred in its instruction that to avoid the policy the insured building must be used generally for the objectionable purpose or that it must be one of its principal uses. The court seemed to be in some doubt as to what uses were incident to occupation as a home. Judicial opinions must be interpreted by the light of the times in which they were written. This opinion was written in April, 1929, and the court evidently recognized that the manufacture of "home brew" for the use of the occupant, was one of the ordinary uses to which dwelling houses were then being put.

Hartman v. Farmers Mutual Ins. Co., 163 Wash. 490; I P. (2d) 913, involved the use of a portion of

the premises as a place for brooding chickens. The case is of little weight because the policy did not require that the insured building be used exclusively as a dwelling (p. 492).

In *Clark v. Western Ins. Co.* 168 Wash. 366; 12 P. (2d) 408, a residence property, insured under a policy limiting the coverage to a loss "while occupied only for dwelling house purposes," was rented to a tenant who used it to conduct a distillery. Verdict and judgment for the insured was reversed on appeal. The Court said:

> "It can not in reason be questioned that the use to which the house in this case was put, either generally or as one of its principal uses at and prior to the fire, was the manufacture of intoxicating liquor, and it must be so held as a matter of law" (p. 370).

Allen v. Merchants Fire Assur. Corp. 179 Wash. 189; 36 P. (2d) 545 involved a policy insuring property only while occupied for dwelling house purposes, and a clause making the policy void in case of increased hazzard. Allen made a contract to sell the property to Commellini. The deed and policy were placed in escrow with a bank which was also the agent for the insurer. Commellini used the property for the business of selling and serving Italian dinners. As against the interposition of these defenses the insured contended that

notice of the change from a dwelling house to a place of public entertainment had been given to the escrow clerk of the bank. Recovery on the policy was denied.

Noting that the insured gave notice to the Insurance Department of the Bank of the change of possession, the Court said: *"But unfortunately, he did not give that department notice of the change of use from that of a dwelling house to that of a place of public entertainment, which would increase the risk and the rate."* (p. 194) (Italics ours).

The term hazzard was used in the policy in that case, but risk and hazzard are synonomous terms.

McCullough v. Northwestern Mut. Fire Assn. 183 Wash. 5; 48 P. (2d) 217, reviews previous cases and distinguishes the case of *Ragley v. Northwestern Nat. Ins. Co.* upon the ground that the operations in that case were not upon such a scale as to be commercial in their scope.

We find no instance in the Washington decisions of a commercial use of an insured building being held to be one of the proper or ordinary uses of a dwelling house.

The use for a hotel and beer parlor constituted an occupation for commercial purposes.

The decisions of the Supreme Court of Washington

cited under sub-div. C, are equally application to an occupation for a hotel and to an occupation for the purpose of the public sale of beer and wine.

Beer and wine may not be lawfully sold in a dwelling house in the state of Washington. An occupation for that purpose can not be considered as an occupation for dwelling house purposes.

The sale of beer and wine in the state of Washington can lawfully be made only under license from the Washington State Liquor Control Board.

Laws 1933, Ex Ses. Sec. 63, Chap. 62.
Rem. Rev. Stat. (Wash.) Sec. 7306-63.

With the exception of clubs and organizations holding picnics, licenses can be granted only to hotels, restaurants, drug stores, soda fountains, taverns, and dining places on boats, aeroplanes, dining, club and buffet cars on passenger trains.

Sec. 2 Chap. 158, Laws of 1935 (Wash.).

A commercial business which under the law of the state can not be conducted in a dwelling house, is not an incident of a dwelling house, nor of a home.

D.

The loss of the personal property was not within the coverage of the policy.

As to personal property it was limited to household furnishings and personal effects owned by William E. Bilquist, or by members of his family, and to a loss only while contained in "the above described dwelling house building" (Tr. 74).

The personal property was neither household furnishings nor personal effects. It consisted of the furniture and equipment of a hotel and a beer parlor. Plaintiffs' Exhibit 4 is a list of the furniture and equipment destroyed by the fire. It is the list attached to the complaint as Exhibit A, as the basis of recovery, and is stated in the bill of exceptions to be a list of hotel upstairs, bath room, rest room, kitchen, lobby, dining room and bar room furniture and equipment destroyed by the fire and filed by the plaintiffs as their proof of loss (Tr. 97).

The record contains no testimony tending to identify any item as personal effects of the insured or members of his family. Beer counters, bars, ranges, and electric water pumps are not household furnishings. The lost property was the equipment of a commercial business—a hotel and beer parlor, and in no sense the furnishings of a household or home. It was acquired with the hotel or bought on the installment plan and paid out of the business (Tr. 100). It was owned jointly by Myhre and Bilquist (Tr. 103), one of whom,

at least, never had any household there.

The approved definition of a household is a number of persons living under the same roof and composing a family.

Words and Phrases, p. 3361.

Arthur v. Morgan, 112 U. S. 495-499.

"The goods and chattels of an innkeeper, consisting of bar furniture and beds for his guests, are not household goods. The beds upon which the innkeeper lodges his guests are the implements of his trade, and all the furniture in a public inn, except so much as may be necessary for the accommodation of the family, is intended for the same purpose."

Commonwealth v. Stemstock (Pa.) 24 Am. Dec. 351-353.

In *Robbins v. Bangor R. E. Co.* 100 Me. 496; 62 Atl. 136-141, upon the question of whether a building was a dwelling house or a boarding house, the court observed that boarders do not constitute a family or any part of it; that a boarding house is none the less a boarding house when used as such, because the boarding house keeper and his family live in it while the business of keeping a boarding house is carried on. It was said that the tenant's business was the keeping of a boarding house and that he had no other substantial business, and that his living on the premises was incidental to the carrying on of the business.

The burden of proof to bring the listed articles within the coverage of the policy by showing that they were household furnishings or personal effects of the insured or members of his family, was upon the plaintiffs.

10 beds, 11 dressers, 10 wash stands, 6 dining room tables with 4 chairs each, a beer counter and bar, dishes and silver ware for the service of 40 persons, 2 refrigerators, an electric water pump, and the miscellaneous equipment of the hotel lobby, dining room, bar and kitchen could hardly be the household furnishings of Bilquist and his wife who occupied only sleeping quarters on the top floor (Tr. 8, 9).

E.

The loss falls outside the coverage of the policy because not contained in a dwelling house building.

In *Johnson v. Franklyn Ins. Co.* 90 Wash. 631; 156 P. 567, the court considered a policy covering goods "all while contained in the frame building while occupied only as a dwelling at No. 30 Franklyn St." At the time of the loss the property was at 2832 Fifth Avenue. Judgment for the insured was reversed on appeal. The court held that the quoted provision was as much of the essence of the contract as any other part of the promise.

There is no distinction in principle between insur-

ance of chattels while located at a particular place and insurance while the building in which they are located retains a particular character.

An insurance company has the right to determine for itself whom and what it will insure and the conditions under which it will insure.

Jump v. North British, etc., Ins. Co. 44 Wash. 596; 87 P. 928.

In the provision of the policy limiting its coverage of personal property to a loss only while contained in the above described dwelling house building, the words "dwelling house" is not merely identification of the building, but is a restriction of the coverage to a loss sustained while the subject matter is contained in the building and while it continues to be a dwelling house.

The term "dwelling house" is to be construed in the light of the subject matter and the purpose for which it is used. In insurance the term "dwelling house" is employed to restrict the risk to the rate. The rate, shown by the policy as $1.925 (Tr. 72), was the same on both real and personal property. The three-year rate on a dwelling was $1.92; the one-year rate $1.10. The rate on a hotel was $3.46 for one year (Tr. 129). The rate for a beer parlor would not be less (Tr. 138).

Where insurance is written upon chattels contained in a dwelling house building at the rate fixed for

dwelling house risks and the owner uses the building for a hotel or beer parlor where the risk is measured by a premium more than three times as great, there is a direct violation of the coverage restriction to a dwelling house building. The purpose of the restriction is to hold the risk in proper relation to the rate.

A fire insurance policy insured household furniture while contained in a certain frame building at a given location, occupied as a store and dwelling. The property was removed to another building at 211 Delaware St. in the same city. An endorsement was placed on the policy by the insurance company to the effect that the insurance was transferred to cover similar property contained in the frame dwelling house at 211 Delaware St. The insured occupied the first floor of this building as a store and the remainder as a dwelling place for himself and family. It was held that the description of the building as a dwelling amounted to an assertion that it was in use as a dwelling house and not to be used for any purpose incompatible therewith, and that the use of part of the building as a grocery store was so far incompatible as to prevent a recovery on the policy.

Greenwich Insurance Co. v. Dougherty 42 Atl. 485, affirmed 46 Atl. 1099; 64 N. J. L. 716.

Appellees may contend that the building was also used for dwelling house purposes, as Bilquist lived there.

One answer is that the coverage was limited to occupation *only* for dwelling house purposes.

The residence of Bilquist and his wife was merely incidental to the operation of the business of conducting a hotel and beer parlor.

In *McCullough v. Northwestern Mut. Fire Assn.* 183 Wash. 5, 48 P. (2d) 217 the contention was raised that the parties conducting a distillery on the premises were also occupying it as a dwelling. The Court said "The tenants devoted the house primarily to the distillation of liquor and not to use as a home. Naturally they lived there, but manifestly the main use of the property was as a distillery" (p. 13).

The record disclosed a purchase of the property because it would be a good place for the Bilquists to make a living (Tr. 100, 105). The main business was serving meals, beds and over week-end guests (Tr. 103). When the hotel was closed in the winter season of 1935-6, the Bilquists went elsewhere. The insured building was to the Bilquists merely a place of business, a place to work. Had there been no work for them there they would not have been there.

It would be equally justifiable to say that the Olympic Hotel in Seattle was occupied only for dwelling house purposes, because its manager occupies parlor, bed room and bath in it.

Occupation by a caretaker is not occupation for dwelling house purposes.

Thomas v. Commercial Assurance Co. 162 Mass. 29; 37 N. E. 672.

A building occupied down stairs as a store and upstairs for living quarters of the owner is not occupied only for dwelling house purposes.

Gallin v. Allemania Ins. Co. 172 N. Y. S. 662.

There can be no recovery without allegation and proof of the occupation of the insured building only for dwelling house purposes at the time of the fire.

Allen v. Home Inc. Co. of N. Y. 133 Cal. 29; 65 P. 138.

F.

Appellees can not plead ignorance of the terms of the policy.

Myhre expected the policy to be held by the mortgagee. Myhre asked Langer for the policy and he gave it to him (Tr. 116). He examined it and said his name did not appear in it (Tr. 121). He had full opportunity to examine the policy and learn its terms. He must

have made some examination to determine that his name did not appear in it.

The law in the state of Washington is that it is the insured's duty to read his policy; and the law says it was done.

Carew, Shaw & Bernasconi v. General Casualty Co. 189 Wash. 329-341; 65 P. (2d) 689.

Perry v. Continental Ins. Co. 178 Wash. 24-26; 33 P. (2d) 661.

Hayes v. Automobile Ins. Exchange 126 Wash. 487-8 218 P. 252.

Rice v. Hartford Ins. Co. 50 Wash. 346; 97 P. 238.

G.

The plaintiffs' action was not one for reformation.

The defendant was entitled to its day in court upon every issue, and was not bound to anticipate issues not set forth in the pleadings.

The pleadings set forth no case for reformation.

There is no allegation as to what terms of the policy are to be reformed, nor what they should be when reformed. There is no offer to do equity by paying the proper premium. The prayer is for money damages and not for equitable relief. The defendant did not set up an equitable defense. The issue of reformation was not presented to nor tried by the District Court. It

was tried upon the law side of the court which granted a recovery upon the policy as written.

Reformation is not incident to an action at law. It can be granted only in equity.

> *United States v. Milliken Imprinting Co.* 202 U. S. 168.
>
> *Invenson v. Hutton,* 98 U. S. 79-82.

To recover upon a coverage different from that of the policy, the issue of reformation should have been set forth in the pleadings, the remedy asked for and the case set to the equity side of the court.

> "The verdict of a jury, where reformation is essential to a recovery, it is not a substitute for the regular practices of a court of chancery to be applied by the District Judge sitting as a chancellor. If the issue of reformation had been involved the proper practice would have been to have transferred the case to the equity side of the court."
>
> *Liberty Oil Co. v. Condon Bank,* 260 U. S. 235.

In a suit to set aside a tax assessment, the Supreme Court of the United States said:

> "So long as we attach importance to the regular forms of procedure we can not sustain so plain an attempt as is here presented to substitute the machinery of a court of law, in which the facts are found by the jury and the law presented by the judge, for the usual and legitimate practice of a court of chancery."
>
> *Lindsay v. Shreveport Bank,* 156 U. S. 485-493.

In the Federal courts a written contract can not be reformed in an action at law.

Simpkins Fed. Practice, Rev. Ed. p. 58.
Pitcairn v. Phillip Hiss, 125 F. 110.

The jurisdiction of the courts of the United States under the constitution is "In law and equity."

Sec. 2 Art. III, U. S. Constitution.

The question of whether the right to an equitable remedy shall be determined by the District Judge sitting as a chancellor, or by a jury, is one relating to the organization and jurisdiction of the federal courts, and is not a matter of substantive law, pleadings, or modes and forms of procedure. It is governed by the constitution and the acts of Congress.

The recent case of *Erie Railroad Co. v. Tompkins*, U. S. Sup. Ct. Law Ed. Adv. Op., Vol. 82 p. 787, in no manner affects those powers or limitations conferred or imposed upon the federal courts by the constitution or by the acts of Congress.

Guffy v. Smith 237 U. S. 101-114.

H.

The Federal authorities are in line with those of the State as to the right to recover where the loss is outside the coverage of the policy.

> "Of course if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he can not do is to take a policy without reading it, and then when he comes to sue at law upon the instrument have it enforced otherwise than according to its terms."
>
> *Lumber Underwriters v. Rife* 237 U. S. 605-610.

Mere knowledge by the insurer of conditions which would cause a breach and forfeiture of a policy of fire insurance upon its issuance, does not operate as a waiver or estoppel when the policy contains a provision that no agent, officer or other representative shall have power to waive any provision or condition of the policy, except those by its terms subject to agreement, and then only by waiver endorsed upon or attached to the policy.

Northwestern National Fire Insurance Co. v. McFarlane, 50 F. (2d) 539.

Eddy v. National Union Indemnity Co. 78 F (2d) 545.

Northern Assurance Co. v. Grand View Building Assn. 183 U. S. 308.

Sun Insurance Co. v. Scott, 284 U. S. 178.

Pennman v. St. Paul Ins. Co. 216 U. S. 311.

The Court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.

Lumber Underwriters v. Rife, 237 U. S. 605-610.

Under the law and the evidence no verdict for the plaintiff could have been returned without disregarding the clause of the policy limiting the coverage to an occupation only for dwelling house purposes.

II.

The use of the insured premises for selling beer and wine and for public dancing increased the hazzard.

The question arises upon the third and fourth assignments of error. They present the identical defense of a policy made void by an increase of hazard.

The third assignment is as follows:

> In denying the defendant's motion, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence, that the court direct the jury to return a verdict for the defendant because it appears from the uncontradicted evidence that subsequent to the issuing and delivery of the policy of insurance, for recovery under which the plaintiffs sue, the plaintiffs caused to be installed in the insured building a bar and apparatus for the dispensing of beer, and from about April 1st, 1936, thence continuously until the destruction of the insured building by fire, the said insured building was by the insured, with the knowledge and consent and under the control of the insured, and without the knowledge or consent of the defendant, used and occupied in part as a beer parlor and place for the public vending and sale of beer and wine and as a place for public dancing, which said use and occupancy increased the hazard of the insurance within the meaning and intent of the provisions of the said policy in that the entire policy

shall be void unless otherwise provided by agreement endorsed upon or added thereto, if the hazard be increased by any means within the control or knowledge of the insured, and that no agreement otherwise providing had been endorsed upon such policy, nor added thereto (Tr. 154).

The fourth assignment is as follows:

In denying the defendant's motion that the court enter a judgment for the defendant, notwithstanding the verdict of the jury, because it appears from the uncontradicted evidence that subsequent to the issuing and delivery of the policy of insurance, for recovery under which plaintiffs sue, the plaintiffs caused to be installed in the insured building a bar and apparatus for the dispensing of beer, and that from about April 1st, 1936, thence continuously until the destruction of the insured building by fire, the said insured building was by the insured, and with the knowledge and consent and under the control of the insured, and without the knowledge or consent of the defendant, used and occupied in part as a beer parlor and place for the public vending and sale of beer and wine and as a place for public dancing, which said use and occupancy increased the hazard of the insurance within the intent and meaning of the express provisions of said policy in that the entire policy shall be void, unless otherwise provided by agreement endorsed upon said policy or added thereto, if the hazard be increased by any means within the control or knowledge of the insured, and that no agreement otherwise providing had been endorsed upon such policy, nor added thereto (Tr. 155).

The policy covered the insured building only when used for dwelling house purposes, and contained a provision that the entire policy should be void, unless oth-

erwise provided by agreement endorsed thereon or added thereto, if the hazard be increased by any means within the knowledge or control of the insured (Tr. 80).

The use of the property as a place for the sale of beer and wine to the public and as a place of public dancing within the knowledge and control of the insured from April 6, 1936, to the time of the fire, was admitted.

Appellees attempted to avoid the provision of the policy, and the forfeiture, by the contention that the use was known to the defendant's agent, Langer and that it did not create an increased hazard.

—A—

The claim of Estoppel based upon the agent's knowledge failed for want of proof.

Langer made no endorsements on the policy that waived any of its provisions (Tr. 121). He was not there after the place was turned into a beer parlor and had no knowledge of how they conducted their business. He never permitted them to open a beer parlor on the premises (Tr. 123).

Myhre said that the beer parlor was operated to the time of the fire. He knew they were selling beer (Tr. 101).

Bilquist said that he made the arrangement with Moen for the beer and wine concession, dividing the profits (Tr. 108). Beer was served in the dining room (Tr. 109). He told Myhre they were going to put it in, but did not tell Langer (Tr. 109).

Langer's knowledge is not shown. After delivery he did not represent the company with respect to the policy, unless he was called upon to take some action concerning it.

Moller & Niagara Fire Ins. Co. 54 Wash. 439-103 P. 449.

—B—

The denial of the motion for a directed verdict and the denial of the motion for a judgment notwithstanding the verdict was error because the uncontradicted evidence showed an increase of hazard, over that assumed under the policy, arising from the use of the premises for selling beer and wine.

The increase of hazard being established by uncontradicted evidence, there was no issue for the jury.

Gunning v. Cooley, 281 U. S. 90.

Whether the evidence is sufficient to require submission of a case to a jury when tried in the Federal courts, is a question to be determined according to the rules laid down in those courts. When the evidence up-

on any issue is all on one side, or overwhelmingly so as to leave no room for doubt as to what the fact is, the court should give a preemptory instruction for a verdict.

Peoples Savings Bank v. Bates, 120 U. S. 556-562.

Southern Pacific Co. v. Pool, 160 U. S. 438.

Slocum v. New York Life Ins. Co. 228 U. S. 364-369.

Chicago Milwaukee & St. Paul Ry. v. Coogan, 271 U. S. 472-478.

Gunning v. Cooley 281 U. S. 90.

There is no question of credability of witnesses. They did not differ as to the existence of an increased hazard. Appellant's witnesses were not interested, nor were they its employees. Their testimony was not contradicted by that of any other witness, nor brought in question by cross examination nor by the admitted facts of the case.

Chesapeake & Ohio Ry. Co. v. Martin 283 U. S. 209.

The only purpose served was to permit the jury to discredit these witnesses, and find the fact contrary to their testimony without evidence to sustain its finding.

The increased hazard was shown by the following testimony.

Allan V. Kelly, an insurance adjuster with 10 or 15 years experience and having an independent adjustment business, testified that assuming that the hotel had been conducted as a seasonal hotel for guests, or as an inn where meals and lodgings were furnished, and a bar, bar room and piano player were placed in the property the hazard would be considerably increased (Tr. 137).

Leonard L. Edwards testified that he was associated with McCollister and Campbell and had charge of fire insurance (Tr. BE 35); That the installation of a bar room and dance hall and bringing in an outsider to conduct the bar room would increase the risk (hazard).

Both of these men were experts in the matter of insurance and qualified to express an opinion. Their competency was not challenged.

It is increased hazard that makes increased rates. The Washington Surveying and Rating Bureau, conducted under the supervision of the insurance department of the State, fixes the classification and rate for all property to be insured, and the classification is according to the hazard, and the rate varies as the hazard varies.

The provision that the policy shall be void in case of an increase of hazard is designed for the legitimate

purpose of preventing an insured from taking out a policy at one rate and devoting the insured property to a use that commands a higher rate.

The fact that the one year rate on a dwelling is $1.10 and on a hotel $3.46 (Tr. 129), and on a road house dance hall and beer parlor, $5.00 per year, less a 30% deviation, but not less than the $3.46 rate (Tr. 137-138), conclusively shows an increase of hazard attending the occupation for a beer parlor over the hazard assumed by the policy.

The testimony relied upon as rebutting the testimony of the existence of an increased hazard is not directed to showing that there was no increased hazard. No witness testified that there was no increased hazard.

Such testimony tended only to show:

That no stoves or electrical apparatus was installed with the bar or the beer parlor, and no oil or combustibles were kept in the bar room; that the fire when discovered was coming from the opposite end of the building from the beer parlor and that there was no fire in the bar room at the start; that persons who frequented the place were orderly and that there was an absence of rowdyism around the place; that there were plenty of ash trays and trash was not thrown around.

The trial court should have held as a matter of law that a change from an occupancy only for dwelling house purposes, carrying a premium rate of $1.10 per year, to an occupancy for a commercial business including the sale of beer and wine to the public and the use of the place for public dancing, carrying a rate of $3.46 per year, or more, was an increase of hazard.

The testimony relied upon as creating an issue of fact for the jury does not tend to deny the existence of an increased hazard, and tends to show nothing more than that the appellees violated the terms of the policy in a cautious, careful and prudent manner.

It is unimportant that the increased hazard may not have caused the fire nor contributed to the loss.

Allen v. Merchants Fire Assurance Corp. 179 Wash. 189; 35 P. (2d) 54, was a case where a building was insured while occupied only for dwelling house purposes, with a clause in the policy making the entire policy void, unless otherwise provided by agreement endorsed upon or attached to the policy, if the hazard be increased by any means within the control or knowledge of the insured. The policy and a deed under a contract of sale from Allen to Albert Commellini were in escrow with a bank which was also the agent of the insurance company and wrote the policy.

Allen notified the insurance department of the bank by letter when possession was delivered to Commellini, and later gave notice to the escrow department of the bank of Commellini's purpose to use the insured building for the purpose of carrying on the business of selling Italian dinners to the public. Holding that a notice to the escrow department was insufficient, and mentioning the fact that Allen gave notice to the Insurance Department when possession was actually changed, the Court said:

> "*But, unfortunately, he did not give that department notice of the change of use from that of a dwelling house to that of a place of public entertainment which would increase the risk and the rate.*" (p. 194). (Italics ours).

A change from an occupation for dwelling house purposes only to an occupation as a place of public entertainment, involving a greatly increased premium rate, is as a matter of law, an increase of hazard within the meaning of that term as used in the policy.

III.

The District Court erred in including in its judgment interest upon the amount of recovery allowed by the verdict covering a period of one year antedating the return of the verdict.

The question arises upon the tenth assignment of error, which is as follows:

> In rendering judgment against the defendant for interest upon the amount of the recovery allowed by the verdict of the jury from February 1st, 1937, and covering a period prior to the date of the judgment and prior to the time of the return into the court of the verdict of the jury on February 1st, 1938; no separate recovery of interest having been allowed in such verdict, and the recovery of interest not having beeen claimed in the complaint. (Tr. 159).

The verdict was returned February 1st, 1938, and the judgment carried interest from February 1st, 1937.

The law of Washington allows interest on unliquidated claims only from the date of judgment.

> *Locomotive Exchange, Inc. v. Rucker*, 106 Wash. 278; 179 P. 859.
>
> *Jellum v. Grays Harbor Fuel Co.* 160 Wash. 585-593; 295 P. 939.

Interest to be recoverable must be ascertainable by mere computation.

> *Wright v. Tacome*, 87 Wash. 334; 151 P. 837.

A fire insurance policy is a contract of indemnity. It undertakes only to pay the loss sustained to an amount not exceeding that stated in the policy. The amount of loss depended upon the values of the personal property, which could be established only by evidence of value; and therefore the claim was an unliquidated one.

The plaintiff's complaint did not ask for interest.

It can not be determined with certainty that the verdict did not include interest.

If the appellees should recover interest antedating the verdict, it will be presumed that the verdict includes it. The contrary can not be established with certainty. The jury was not bound to accept the valuations placed upon the personal property by the plaintiffs.

There is no principle of law more firmly established than that the judgment must conform to the verdict.

It is error to give judgment for interest in addition to the amount of the verdict.

Minot v. Boston 201 Mass. 10; 86 N. E. 783.

Miller v. Farmers Mutual Ins. Co. 199 N. C. 594; 155 S. E. 254.

Butte Electric Co. v. Matthews, 96 Mont. 491; 87 P. 460.

Southern Kansas Ry. v. Showalter, 57 Kas. 681; 47 P. 830.

> "The judgment of the court must follow the verdict where the verdict is general and for a sum in gross, and the question of interest was not reserved by the court, and there is nothing to indicate that the jury omitted interest. It will be presumed that it is contained in the amount of their finding, and the court can not add interest to the verdict."

Wyant v. Beavers, 63 Okla. 68; 162 P. 732.

The question was not reserved and there is nothing to indicate that the jury overlooked it.

The judgment of the District Court should be reversed and judgment entered for the defendant, or remanded with direction to enter such a judgment.

Respectfully submitted,

DAVIS AND GROFF,
Attorneys for Appellant.